FILED

No. 94-1476 MAR 6 1995

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1994

OWENS-CORNING FIBERGLAS CORPORATION,

Petitioner,

—v.—

M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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March 6, 1995

QUESTIONS PRESENTED

1. Whether the $7.5 million award of punitive damages, which is many times larger than respondents' compensatory damage awards and has been assessed against a defendant subject to many punitive damages lawsuits in many jurisdictions for the same course of conduct, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment. *See BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting certiorari to consider excessiveness of punitive damages award under Due Process Clause).

2. Whether the Due Process Clause prohibits a state court from circumventing constitutional limits on its jurisdiction by using a state procedural rule to conscript a corporate defendant — on pain of substantial sanctions — to compel specified employees to travel to the State and appear as witnesses in a civil trial, where the designated employee-witnesses lack minimum contacts with the forum State and therefore are beyond the state court's jurisdictional power.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Owens-Corning Fiberglas Corporation states that it is a publicly held corporation, has no parent company and has the following non-wholly owned subsidiaries or affiliates:

Amiantit Fiberglass Industries, Ltd.
Arabian Fiberglass Insulation Company
Asahi Fiber Glass Company, Ltd.
Fiberglas Colombia, S.A.
Polyplaster, S.A.
Scandinavian Glasfiber AB
Vitro-Fibras, S.A.

All parties to the appeal in the Appellate Court of Illinois are listed in the caption of this petition.

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IN THE
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OWENS-CORNING FIBERGLAS CORPORATION,
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M. OVETA PICKERING, as Special Administrator of the Estate of ARVEL PICKERING, Deceased, CHARLES ANDERSON, CARL OSTERMAN and DONALD DOSSETT,

Respondents.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, Fifth District

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Owens-Corning Fiberglas Corporation ("Owens-Corning") respectfully prays that this Court grant a writ of certiorari to review the judgment of the Appellate Court of Illinois, Fifth District, entered in this case on May 3, 1994 and, after rehearing, on August 26, 1994.

OPINION BELOW

The Appellate Court's opinion is reported at 265 Ill. App. 3d 806, 638 N.E.2d 1127, 203 Ill. Dec. 1 (1994), and is reprinted in the Appendix at 1a-30a. The order of the Illinois Supreme Court denying leave to appeal is noted at 153 Ill. 2d 583 (1994) and is reprinted at 69a. The relevant orders and judgments of the trial court, the Circuit Court for the Third Judicial Circuit, Illinois, have not been reported but are reprinted at 35a-60a and 65a-68a.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on May 3, 1994 [1a-30a], and its order after rehearing was entered on August 26, 1994 [33a-34a]. On December 6, 1994, the Supreme Court of Illinois denied Owens-Corning's timely request for leave to appeal. [69a.] This petition has been filed within 90 days of that ruling. This Court has jurisdiction to review the Appellate Court's judgment under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Illinois Supreme Court Rule 237(b) provides, in part, that "[t]he appearance at the trial of a party or a person who at the time of trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear."

This petition questions the constitutionality of Rule 237(b) as applied in this case. Because neither the State of Illinois nor any agency, officer or employee of that State is a party, Owens-Corning notes that 28 U.S.C. § 2403(b) might be applicable.

STATEMENT OF THE CASE

In 1953, Owens-Corning began to distribute Kaylo, an insulation product containing approximately 15% asbestos. Owens-Corning began manufacturing Kaylo in 1958, when it purchased the Kaylo division from Owens-Illinois, Inc. Owens-Corning stopped making and selling asbestos-containing Kaylo by early 1973. [3/31/92 Tr. 60-61.] By now, more than 20 years later, Owens-Corning has received hundreds of thousands of claims from persons alleging injury from exposure to Kaylo.

The four consolidated cases that are the subject of this petition were filed in the Circuit Court for the Third Judicial Circuit of Illinois by respondents Charles Anderson, Carl Osterman and Donald Dossett and by respondent M. Oveta Pickering, on behalf of her deceased husband (collectively, "plaintiffs"). Plaintiffs claimed that they (and Mr. Pickering) had contracted asbestos-related conditions from their exposure to asbestos-containing products — allegedly including Kaylo — while working at an Illinois oil refinery at various times between the early 1940s and mid-1980s. Plaintiffs sought compensatory as well as punitive damages based on Owens-Corning's alleged misconduct in making and selling Kaylo without issuing warnings about the product's purported hazards. (Punitive damages were unavailable in the *Pickering* action, however, because Illinois law bars recovery of such damages in wrongful-death suits.)

A. Preservation of Constitutional Issues

This petition presents two federal questions: (*i*) whether the $7.5 million punitive damages awards are unconstitutionally excessive and (*ii*) whether Illinois Supreme Court Rule 237(b) was unconstitutionally applied to coerce the appearance at trial of four specified Owens-Corning employees over whom the trial court could not exercise personal jurisdiction.

In the trial court, Owens-Corning challenged the constitutionality of the punitive damages awards in its post-trial motion [61a-64a; *see also* R. C4905-5038], which the trial court denied [65a-68a]. Owens-Corning challenged the constitutionality of Illinois Rule 237(b), as applied in this case, both in a motion to quash the notices served under that rule [*e.g.*, 35a-36a; *see also* R. C3517-58, C3447-89; 3/3/92 Tr. 45-63] and in its post-trial motion [61a-62a; *see also* R. C4905-5038]. The trial court denied both motions. [35a-38a, 65a-68a; *see also* 3/5/92 Tr. 3-16.] On appeal to the Appellate Court of Illinois, Fifth District, Owens-Corning again raised its constitutional challenges to the punitive awards and Rule 237(b), but the court rejected Owens-Corning's arguments. [23a-26a, 15a-16a.]

B. Sanctions Under Illinois Supreme Court Rule 237(b)

On January 21, 1992, plaintiffs served on Owens-Corning a notice under Illinois Supreme Court Rule 237(b) demanding that the company's Chief Financial Officer ("CFO"), Paul V. Daverio, appear at trial and bring with him a vast array of corporate financial records from 1987 through 1992. [R. C2000-01.] *See infra* note 2. On February 25, plaintiffs served a second Rule 237(b) notice [R. C2733] for Glen H. Hiner, Owens-Corning's new Chairman and Chief Executive Officer ("CEO"), who had been with the

company for only one month [R. C3468]. Plaintiffs purportedly needed Messrs. Hiner and Daverio to testify about the company's financial condition as part of their punitive damages case (which, under Illinois law, was not even at issue in *Pickering*). [R. C4104-05; 3/5/92 Tr. 3-16.] The February 25 notice also demanded the appearance of two in-house Owens-Corning attorneys who had been involved in the company's asbestos personal injury defense but whose work on these matters had not begun until long after Owens-Corning had stopped making or selling asbestos-containing Kaylo. [R. C4371, C3474.] The two attorneys purportedly were needed because they had signed interrogatory responses in the asbestos litigation. [R. C4104-05; 3/5/92 Tr. 3-16.]

None of these four persons lived or worked in Illinois. Each had his office and principal place of business in Ohio, and all resided there except Mr. Hiner (who had not yet moved *to* Ohio).

On February 28, 1992, Owens-Corning moved to quash the Rule 237(b) notices because plaintiffs had not shown good cause, as required by Illinois law, to compel the four individuals to appear. Owens-Corning was concerned that its top officials would be subjected to harassment and effectively prevented from carrying out their corporate duties if each (or even a small percentage) of the thousands of asbestos claimants seeking punitive damages in Illinois (not to mention plaintiffs in other states) could compel the company's CEO and CFO to travel from Ohio and appear at trial as adverse witnesses.[1] In addition, both Owens-Corning and the

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1. Courts throughout the country have recognized that attempts to require testimony from top corporate officials can lead to abuse and harassment and therefore have directed discovering parties to try first to obtain testimony from lower-level corporate witnesses or (continued...)

four individuals (who appeared specially through separate counsel) argued that the court lacked personal jurisdiction over the employees and thus could not constitutionally compel their appearance.

The Circuit Court denied the motion on March 5, 1992 and directed the company to produce the four employees. [35a-38a.] After the Illinois Supreme Court denied Owens-Corning's petition for leave to seek a writ of mandamus [39a], Owens-Corning informed the Circuit Court that it would not compel the employees to appear at trial [3/6/92 Tr. 20-21; 3/11/92 Tr. 70-74; 3/16/92 Tr. 15]. The court then entered a March 17 order sanctioning Owens-Corning, striking its pleadings, precluding it from cross-examining plaintiffs' witnesses or presenting evidence on *any* liability issue, and barring it from calling *any* current or former officer, director or employee as a witness. [40a-42a; *see also* 3/16/92 Tr. 4-23; 3/17/92 Tr. 3-36, 43.] Plaintiffs presented their case in chief, and the court entered a default judgment against Owens-Corning on March 31, 1992 "on the issue of liability" for both compensatory and punitive damages. [43a-48a.] The jury awarded compensatory damages of $2,791,971.45 in the *Pickering*

1.(...continued)

through means less intrusive than live testimony. *E.g.*, *Baine v. General Motors Corp.*, 141 F.R.D. 332, 335-36 (M.D. Ala. 1991) (barring deposition of General Motors' vice president where information was available from lower-level employees); *Liberty Mut. Ins. Co. v. Superior Court (Frysinger)*, 10 Cal. App. 4th 1282, 13 Cal. Rptr. 2d 363, 366 (1st Dist. 1992) ("'apex'" discovery "raise[s] a tremendous potential for discovery abuse and harassment. Vast numbers of personal injury claims could result in the deposition of the president of a national or international company whose product was somehow involved."); *accord Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979); *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985); *Hughes v. General Motors Corp.*, 18 Fed. R. Serv. 2d (Callaghan) 1249, 1249-50 (S.D.N.Y. 1974).

action [53a-54a], while trial continued in the three personal injury cases, where punitive damages were available under Illinois law.

C. Sanctions Relating to Owens-Corning's Net Worth

Under Illinois law, evidence of a defendant's "net worth" — defined "very simply" as the "remainder after deduction of liabilities from assets" — is admissible solely "to give the jury a true idea of defendant's ability to pay a punitive judgment." *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 200, 334 N.E.2d 79, 94 (1975) (quotations omitted). Using this doctrine as an excuse for harassing and burdensome discovery, plaintiffs served 34 interrogatories demanding vast amounts of financial data going far beyond net-worth information. [R. C2002-14.][2] Because Owens-Corning is a public company, it has publicly available, audited financial statements, which it produced to plaintiffs. These statements showed that the company's net worth was a *negative* $1.076 billion. [Court Ex. 36E at 22-23.] Owens-Corning also provided information about its securities, executive compensation and benefits, financial statements, revenues, expenses, assets and liabilities. [R. C5245, C4302-25.] Owens-Corning objected, however, to producing highly confidential (and plainly inadmissible) information about *future* business plans or financial projections. Owens-Corning also

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2. For example, plaintiffs demanded production of "[a]ll financial statements or other documents" for the years 1987 through 1992 reflecting gross income and expenses, total sales, total net income, gross advertising receipts, officers' and directors' salaries, capital contributions, taxes paid, amounts paid for fringe benefits and stock options for officers and directors, a statement of sources and use of funds, non-expense disbursements, projections, business plans, sales or acquisitions of capital assets, fair market value of corporate assets, intangible or other assets owned but not reflected on financial statements, and life insurance policies on stockholders, officers and directors. [R. C2000-01.]

objected to having to perform a special appraisal of its worldwide assets, but it did produce an extant appraisal of the insured replacement value of its buildings, machinery and equipment in the United States [4/1/92 Tr. 5; R. C5260] as well as the values of identifiable assets both inside and outside the United States [Court Ex. 36E at 38-39].

The court ordered production of still more information [R. C4531-32] and held an evidentiary hearing at which an Owens-Corning Vice President testified [4/2/92 Tr. 2-71]. Plaintiffs moved for sanctions, and the court granted the motion on April 3, 1992, prohibiting Owens-Corning from contesting the issue of net worth in the punitive damages cases. [49a-50a; *see also* 4/2/92 Tr. 91.] In instructing the jury on considerations relevant to determining the amount of punitive damages to be awarded, the court later directed the jurors to "accept as a fact, that the net worth of [Owens-Corning] is $1.5 billion" [51a] — an instruction that *overstated* the company's net worth by *$2.576 billion*.[3]

D. Punitive Damages Jury Charge and Awards

Plaintiffs tendered to the trial court two proposed instructions on punitive damages, one of which mentioned the punishment and deterrence purposes of punitive damages, and the other of which told the jury it could consider Owens-Corning's purported

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3. The $1.5 billion figure represented plaintiffs' multiplication of Owens-Corning's outstanding shares by their then-current market price. [4/6/92 Tr. 110-18.] This market value figure, however, has nothing to do with "net worth" as defined under Illinois law and financial conventions; nor is it probative of a company's ability to pay a punitive damages award.

$1.5 billion "net worth."[4] Owens-Corning objected to the proposed instructions on constitutional grounds (among others), because they did not guide the jury or confine its discretion in deciding whether, and in what amount, to award punitive damages. [4/7/92 Tr. 20-28, 93-94; 4/8/92 Tr. 18; R. C4706-11.] The court overruled the objections. [4/7/92 Tr. 21, 23, 26-27, 94.]

Having defaulted Owens-Corning on liability for punitive damages, the court then issued plaintiffs' tendered instructions, which it supplemented by extemporaneously telling the jurors they could award "any amount [of punitive damages] you feel is appropriate." When Owens-Corning objected, the court overruled the objection. [51a-52a.]

The jury awarded $7.5 million in punitive damages — $2.5 million for each plaintiff — as well as compensatory damages of $102,500, $138,000 and $255,000 for plaintiffs Anderson, Dossett and Osterman, respectively. [55a-60a.] Owens-Corning filed a timely post-trial motion challenging the constitutionality of the punitive damages, the jury instructions and the extraterritorial

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4. The two written instructions read in full:

> "[I]f you believe that justice and public good require it, you may, in addition to any damages to which you find such Plaintiff or Plaintiffs entitled, award an amount which will serve to punish [Owens-Corning] and to deter others from the commission of like offenses." [51a.]

> "If you decide that the interests of justice and public good warrant the assessment of punitive damages against [Owens-Corning], you may consider the net worth of [Owens-Corning] in determining what, if any, amount of punitive damages would be sufficient to punish [Owens-Corning] and to deter others from like offenses. The Court has found, and you shall accept as a fact, that the net worth of [Owens-Corning] is $1.5 billion." [51a.]

application of Rule 237(b). [61a-64a.] The trial court summarily denied the motion. [65a-68a.]

Owens-Corning appealed to the Appellate Court of Illinois, Fifth District, preserving its arguments that the punitive damages awards and the application of Rule 237(b) violated the Due Process Clause. [3/31/93 Brief.] The Appellate Court affirmed. [1a-30a.] The court later granted Owens-Corning's petition for rehearing and allowed the trial transcript to be added to the record [31a-32a], but ultimately ruled that its original decision would stand as filed [33a-34a]. The Illinois Supreme Court denied Owens-Corning's request for leave to appeal [69a] as well as its requests for reconsideration [72a-73a] and for a stay of mandate [70a-71a]. Justice John Paul Stevens denied Owens-Corning's emergency application for a stay pending the filing and disposition of this petition. [74a-76a.]

REASONS FOR GRANTING THE WRIT

Just last Term, this Court reiterated in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331, 2335, 2341 (1994), that the Fourteenth Amendment's Due Process Clause "imposes a *substantive* limit on the size of punitive damage awards" and requires judicial review of their size (emphasis added). The Court previously had ruled in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21 (1991), that a punitive damages award would not be constitutional unless the damages were "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." And in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993), a plurality of the Court opined that "grossly excessive" punitive awards breach substantive due process limitations and that this "grossly excessive" standard incorporates "a general concern of reasonableness" (quotations and brackets omitted).

The Court has not yet elaborated on either "the character of the standard that will identify unconstitutionally excessive awards" or "what standard of review is constitutionally required." *Honda Motor Co.*, 114 S. Ct. at 2335, 2341 n.10. However, the Court recently granted certiorari in *BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995), in which BMW has asked the Court to adopt various "objective" factors that courts should consider in evaluating excessiveness. Those factors apply as well to the present case and demonstrate that the $7.5 million punitive judgment against Owens-Corning is unconstitutionally excessive.

The Court therefore should either grant Owens-Corning's petition for certiorari at this time, or hold the petition until *BMW* has been decided and then grant the petition and vacate and remand for reconsideration in light of *BMW*. As the Court is aware, BMW is not alone in facing multiple punitive damages actions in multiple jurisdictions for the same course of conduct. Whether those claims number 1,000 (as potentially could be the case for BMW) or 200,000 (as have been filed against Owens-Corning), courts and litigants need meaningful guidance on how to treat punitive damages claims, especially in mass-tort litigation. At a minimum, the Illinois Appellate Court should be given an opportunity to reconsider its rulings in this matter in light of the Court's forthcoming decision in *BMW*.

The Court also should grant certiorari to consider the Illinois courts' application of Illinois Supreme Court Rule 237(b), through which Illinois courts frequently circumvent Fourteenth Amendment limitations on their jurisdiction by conscripting employers to coerce the appearance of named individuals over whom the State itself could not constitutionally exercise personal jurisdiction. This erroneous and dangerous doctrine subverts constitutional restrictions on States' authority, in conflict with

numerous decisions of this Court. It also presents an important question of federal law that this Court should settle promptly, to prevent other parties from using Rule 237(b) and similar rules in other States to harass Owens-Corning — which has thousands of asbestos claims pending in Illinois — and other corporate litigants by threatening to turn their directors, officers and employees into full-time trial witnesses for adverse parties.

I.

THE $7.5 MILLION PUNITIVE DAMAGES JUDGMENT IS GROSSLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE AND THE FACTORS PRESENTED IN THE *BMW* CASE.

As this Court recognized in *Honda Motor Co.*, "[p]unitive damages pose an acute danger of arbitrary deprivation of property" and often allow juries to "use their verdicts to express biases against big businesses, particularly those without strong local presences." 114 S. Ct. at 2340-41. The Court therefore held that "the Constitution imposes a substantive limit on the size of punitive damage awards" and that the Due Process Clause also requires "judicial review of the size of punitive damage awards." *Id.* at 2335, 2341.

The certiorari petition recently granted in the *BMW* case poses the question of when a punitive damages award is unconstitutionally excessive. To answer this question, BMW has proposed a number of "objective" factors (based on this Court's prior statements) to assist a reviewing court in determining whether a punitive award is unconstitutionally excessive. Those factors include (*i*) the relationship between the punitive damages and the actual or potential harm, (*ii*) the existence of other punitive awards for the same alleged misconduct and (*iii*) a comparison of the punitive

award at issue with other awards for the same or similar conduct. These same factors should play a role in any evaluation of the excessiveness of the awards here, and the Court therefore should grant certiorari so the Illinois courts can review the judgment with the benefit of the Court's *BMW* decision.

In fact, Owens-Corning's petition presents an even more compelling need for review than does *BMW*. The three punitive awards here — $2.5 million each, totalling $7.5 million — are more excessive than the single $2 million award in *BMW*. In addition, Owens-Corning's situation is more serious than BMW's because Owens-Corning — like numerous other defendants faced with multiple product liability or other tort claims — is subject to an even larger number of claims arising from a single course of conduct and seeking punitive damages. The existence of and potential for multiple and unlimited awards of punitive damages for the same conduct exacerbates the excessiveness of the $7.5 million awarded here to just three of some 100,000 pending claimants. Moreover, the procedures through which the $7.5 million awards were imposed and affirmed were far less protective of Owens-Corning's due process rights than were the Alabama procedures approved in *Haslip*. These procedural problems render the excessive punitive awards even more suspect than they otherwise might be — and cast further doubt on their ability to withstand substantive due process scrutiny.

A. Relationship Between Punitive and Compensatory Damages

Citing *Haslip*, BMW asks the Court to consider the excessiveness of the punitive award in light of its relationship to the actual or potential harm. This Court in *Haslip* reviewed a punitive damages award that was "more than 4 times the amount of com-

pensatory damages." Although the Court ultimately upheld the award, it warned that "the monetary comparisons are wide and, indeed, may be close to the line . . . of constitutional impropriety." 499 U.S. at 23-24.

Like the punitive award in *BMW*, the $2.5 million in punitive damages awarded to each of the three plaintiffs here crossed that constitutional line. The ratios ranged from almost 10 times compensatory damages for Mr. Osterman and more than 18 times for Mr. Dossett to more than 24 times for Mr. Anderson [55a-60a] — well above the proportion that raised constitutional concerns in *Haslip*. In fact, the Appellate Court ruled that, under Illinois law, "the amount of punitive damages does *not* have to be proportional to the amount of compensatory damages awarded." [25a (emphasis added).] The court thus disavowed the existence of *any* proportionality requirement.

As in *BMW*, the excessiveness of these ratios is far more of a problem here than in *Haslip*, which involved only isolated conduct. BMW allegedly repainted some 1,000 cars sold in the United States and thus could be sued and subjected to punitive damages up to 1,000 times. Owens-Corning's position is even worse: the company already has received over 200,000 asbestos-related claims. Almost 100,000 claims were pending (and another 74,000 had been resolved) when the judgments here were entered [Court Ex. 36E at 26], and even more claims are pending today. In this context, even a one-to-one ratio between punitive and compensatory damages is excessive: where compensatory damages amount to millions or billions of dollars, and where hundreds of thousands of claims have been filed, the relationship between exemplary and actual damages should be measured in fractions, not multiples — if punitive damages are to be awarded at all. *See, e.g., Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1106, 858 P.2d 568, 583, 23 Cal.

Rptr. 2d 101, 116 (1993) ("the additional deterrent value of punitive damages does not appear to be needed [where] actual damages, alone, represent a potentially crushing liability"); *see also Dunn v. HOVIC*, 1 F.3d 1371, 1405 (3d Cir.) (Weis, J., dissenting) ("The amounts awarded [against Owens-Corning] in prior litigation have been more than adequate to meet the needs of punishment and deterrence."), *cert. denied*, 114 S. Ct. 650 (1993). Thus, punitive awards ranging from almost 10 to more than 24 times compensatory damages clearly are out of line — especially where the compensatory damages themselves are as substantial as they were here.[5]

B. Existence of Other Punitive Awards for the Same Course of Conduct

BMW also asks the Court to consider the existence or possibility of multiple awards of punitive damages in evaluating excessiveness — as did the punitive damages scheme upheld in

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5. Although *TXO* upheld a punitive award that was 526 times larger than the compensatory award, the plurality based its decision on the relationship between the $10 million punitive award and the *potential* harm that could have resulted, which apparently ranged from $1 million to $8.3 million. 113 S. Ct. at 2722. Moreover, the actual harm caused in *TXO* was relatively small (only $19,000), so a higher punitive ratio might have been justifiable to accomplish the goals of punishment and deterrence. *TXO* posed the classic case for punitive damages, which originally were designed for situations where actual damages were either unavailable or too insignificant to demonstrate society's disapproval of the alleged misconduct. *See, e.g., Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967). But where each plaintiff has been awarded substantial actual damages ranging from $102,500 to $255,000, and where 100,000 other plaintiffs also are currently seeking compensatory and punitive damages for the same conduct, ratios even as high as those the Court previously has approved cannot be justified.

Haslip.[6] Like *BMW*, this case also presents the question whether, and to what extent, the existence of and potential for other punitive awards for the same conduct should be a factor in determining the excessiveness of the punitive damages at issue.

Indeed, the argument for requiring consideration of this factor is particularly strong here. By the time plaintiffs' cases went to trial in early 1992, almost 20 years after the conduct at issue had ended, about 160,000 asbestos personal injury claims had been filed against Owens-Corning, and approximately 85,400 were then pending. [Court Ex. 36E at 26.] (The numbers have increased substantially since then.) The record shows that, as of December 1990, 11 previous juries already had awarded $40,718,000 in punitive damages against Owens-Corning. [12/19/90 Affidavit of Robert A. McOmber ("McOmber Aff.") ¶¶ 8, 17.] (These num-

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6. *See Haslip*, 499 U.S. at 22 (reviewing court considers "the existence of other civil awards against the defendant for the same conduct, these . . . to be taken in mitigation"); *see also Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1418 (4th Cir. 1992) (en banc) (*Haslip* requires "double recovery analysis [of] other civil or criminal penalties levied on the defendant"); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991) ("Any penalty imposed should take into account as a mitigating factor any other penalty that may have been imposed or which may be imposed for the conduct involved, including . . . any other punitive damages award arising out of the same conduct."); *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 909 (W. Va. 1991); *see also* Restatement (Second) of Torts § 908, comment e (1965).

In fact, the very existence of multiple, unlimited awards of punitive damages for a single course of conduct constitutes the type of unconstrained and excessive punishment that the Due Process Clause prohibits. *E.g., Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1064, *vacated on other grounds*, 718 F. Supp. 1233, 1234 (D.N.J. 1989).

bers also have increased very substantially.) At the same time, Owens-Corning also was paying enormous amounts of money to compensate plaintiffs and resolve claims. During 1990, for example, the company resolved about 12,200 asbestos claims at a cost of $117 million (excluding defense costs); during 1991, it resolved another 15,500 claims at an additional cost of $145 million. [Court Ex. 36E at 26.] By the end of 1991, Owens-Corning also had charged a total of $950 million against its earnings to cover the *uninsured* future costs of resolving then-pending asbestos claims and additional claims to be received through 1999. [*Id.* at 23.]

In this context, punitive awards of $2.5 million per person cannot stand. If even 10% of the 85,400 then-pending claimants were to obtain similar judgments, Owens-Corning's additional punitive liability would amount to *$21.35 billion* — not including any amounts to be paid for compensatory damages and settlements. Not only is any such liability unconstitutionally excessive; it also would preclude Owens-Corning from compensating other claimants who have not yet recovered for their own alleged injuries.

C. Relationship to Other Punitive Awards for the Same Course of Conduct

BMW asks the Court to consider the relationship of the punitive damages to other awards for the same type of conduct, and it notes that another jury in the same jurisdiction declined to award punitive damages on similar facts. This Court's *Haslip* opinion sanctioned a "comparative analysis" — in which the award at issue is compared with other punitive awards for similar conduct — as "an additional check on the jury's or trial court's discretion." 499 U.S. at 20-21. Once again, this case presents the same issue as in *BMW*, and a comparative analysis of the punitive damages here would show their unconstitutional excessiveness.

The $7.5 million award — $2.5 million to each of three plaintiffs — is both the largest total and the largest per capita judgment ever upheld against Owens-Corning after appeal in an asbestos case. In fact, to counsel's knowledge, it is one of the largest awards, if not the largest award — either total or per capita — ever sustained on appeal against *any* asbestos defendant. No other total award sustained on appeal against Owens-Corning has ever exceeded $5 million (in a case involving five plaintiffs); no other per-plaintiff award has ever exceeded $1.5 million after appeal; and some unappealed awards have been substantially less.[7] And, as in *BMW*, a significant number of juries have not awarded punitive damages at all. *See Dunn v. HOVIC*, 1 F.3d at 1388.

The in banc Court of Appeals for the Third Circuit recently held that a district court had given "insufficient consideration to the effect of successive punitive awards in asbestos litigation" in remitting a $25 million award against Owens-Corning to $2 million. The Third Circuit further reduced the award to $1 million because

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7. *See Owens-Corning Fiberglas Corp. v. Adams*, 113 S. Ct. 3035 (1993) (certiorari denied where $30,000 was awarded to each of 21 plaintiffs, for total of $630,000); *Owens-Corning Fiberglas Corp. v. Barnes*, 113 S. Ct. 3035 (1993) (certiorari denied where $250,000 was awarded to each of 15 plaintiffs, for total of $3,750,000); *Dunn v. HOVIC*, 1 F.3d at 1391 ($1 million for one plaintiff, after remittiturs); *Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683 (5th Dist.) ($1 million to each of five plaintiffs; total of $5 million), *rev. denied*, 152 Ill. 2d 561, 622 N.E.2d 1208 (1993), *cert. denied*, 114 S. Ct. 1219 (1994); *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854 (Iowa 1994) ($1.5 million to one plaintiff); *Owens-Corning Fiberglas Corp. v. Watson*, 413 S.E.2d 630 (Va. 1992) ($100,000 to one plaintiff); *see also* McOmber Aff. ¶¶ 8, 17 (citing judgments of $280,000, $25,000 and $8,000). Other punitive damages judgments still are subject to appeal or post-trial motions; the remainder were settled after entry of judgment.

"[o]ur review of the list of jury verdicts submitted by OCF to the district court indicates to us that even the $2 million dollar figure greatly exceeds the level of punitive damages awarded in other similar asbestos cases." *Dunn*, 1 F.3d at 1391. The court concluded that $1 million was "the *maximum* amount of punitive damages that could reasonably have been awarded in this case." *Id.* (emphasis added). Five members of the in banc court dissented, however, because they believed the Due Process Clause bars *any* further awards of punitive damages against Owens-Corning. *Id.* at 1400-05 (Weis, J., dissenting); *id.* at 1405 (Becker, J., dissenting). The total and per capita awards here far exceed the amounts that so concerned the *Dunn* court. The comparative approach thus demonstrates the judgment's unconstitutional excessiveness.

D. Additional Considerations Indicating Excessiveness

In *Haslip* and *Honda*, the Court noted the relationship between the procedural and substantive due process analyses of a punitive damages award: compliance with procedural due process provides some comfort (although not total assurance) that a punitive award will not be substantively excessive. *See Haslip*, 499 U.S. at 21 (upholding award because jury instructions and post-trial review helped ensure that damages were substantively "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition"); *see also Honda Motor Co.*, 114 S. Ct. at 2341 ("proper jury instruction . . . is a well-established and, of course, important check against excessive awards," but judicial review for substantive excessiveness still is required because jury might not follow instructions).

In the present case, however, neither the trial court's nor the Appellate Court's procedures conformed to *Haslip*'s and *Honda*'s standards. These procedural deficiencies — unlimited jury

discretion guided only by greatly exaggerated corporate wealth evidence, and lack of meaningful appellate review — undermine whatever presumptive validity the jury's verdicts otherwise might have had and reinforce the need for a substantive excessiveness review based on the factors presented in *BMW*.

Inadequate Jury Instructions. This Court held in *Haslip* that "unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18. Because of the sanctions entered against Owens-Corning, the jury was allowed to determine only the amount of — not liability for — punitive damages, and the jury charge gave the jurors essentially unlimited discretion in fixing that amount. In addition to the written instructions previously discussed with the parties, the court extemporaneously told the jury they could award "any amount [of punitive damages] you feel is appropriate." [51a-52a.] This instruction, which effectively authorized the jury to exercise unbounded discretion in selecting the punitive award, was constitutionally insufficient under *Haslip*. *See, e.g., Johnson v. Hugo's Skateway*, 974 F.2d at 1414–15 ("'standardless'" instructions allowing jury to award such punitive damages "'as you shall unanimously agree to be proper'" were unconstitutional because they failed to provide "guidance about what to consider in fixing the 'proper' amount"); *Mattison v. Dallas Carrier Corp.*, 947 F.2d at 100-01, 105 (instruction that "'[t]he amount of punitive damages assessed against any defendant may be such sum as you believe will serve to punish that defendant and deter it and others from like conduct'" violated due process because jury was "left to its own devices to take property or mete out punishment to whatever extent

it feels is best in the course of the process, . . . without any meaningful standard or limitation").[8]

Focus on Wealth Evidence. In addition, the instructions improperly (and inaccurately) focused the jury's attention on the corporate defendant's alleged wealth — an issue about which this Court previously has expressed its concern. *See Honda Motor Co.*, 114 S. Ct. at 2340-41 ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses"); *Haslip*, 499 U.S. at 22 ("the factfinder must be guided by more than the defendant's net worth"); *see also id.* at 19 (noting that jury was *not* allowed to hear wealth evidence). The *only* specific factor the trial court told the jury to consider was Owens-Corning's alleged $1.5 billion "net worth." [51a.] And this instruction itself was incorrect (and certainly incomplete) because it used Owens-Corning's stock market value, not its "net worth," which is defined as assets minus liabilities, *Fopay*, 31 Ill. App. 3d at 200, 334 N.E.2d at 94. Owens-Corning's "net worth" actually was a *negative* $1.076 billion, not a positive $1.5 billion. [Court Ex. 36E at 22-23.] The court thus *overstated* Owens-Corning's net worth by *$2.576 billion*.

Inadequate Appellate Review. This Court held in *Haslip* that due process requires meaningful and adequate appellate review

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8. The Appellate Court dismissed Owens-Corning's attack on the trial court's spontaneous addition to the written jury instructions because the appellate record did not contain "a report of proceedings" showing what the judge had added. [24a.] The court granted rehearing so Owens-Corning could file this report of proceedings [31a-32a] — but then declined to change its original opinion even though the record now contained the missing information [33a-34a]. Thus, the Appellate Court apparently rejected Owens-Corning's argument on the merits.

as "an additional check on the jury's or trial court's discretion." 499 U.S. at 20-21; *see also Honda Motor Co.*, 114 S. Ct. at 2335 ("Due Process Clause requires judicial review of the amount of punitive damage awards"). The Appellate Court, however, did not make any reasoned, independent evaluation of the excessiveness of the punitive awards. It merely declined to assume that the *trial court's* review was "cursory, standardless or meaningless," and it summarily concluded that the awards "do not violate defendant's right to substantive due process." [25a.] For example, the Appellate Court did not independently assess the implications of other past and potential awards of punitive damages against Owens-Corning; it stated only that "there is nothing in the record in the case at bar to lead us to believe that the *trial court* did not consider this factor." [26a (emphasis added).] Nor did the court acknowledge the obvious error in the jury instruction on Owens-Corning's "net worth" and review the judgment based on the audited financial information in the record [Court Ex. 36E at 22-23].

These various procedural problems were exacerbated by the sanctions imposed on Owens-Corning, which precluded the company from mounting any defense to plaintiffs' punitive damages case. Even the scant record that does exist provides ample basis to conclude that the $7.5 million punitive awards are unconstitutionally excessive under the factors at issue in *BMW*. But the Draconian defaults also interfered with the Appellate Court's ability to perform the excessiveness review required by *Honda*, because Owens-Corning had been barred from making a full record in the trial court. Even if the Due Process Clause allows a court to sanction a litigant by precluding critical information that a jury needs to make a reasoned decision on punitive damages, an appellate court cannot use a state procedural rule to blind itself to constitutional limits on the size of punitive damages awards.

* * * *

As BMW argued in its petition, the lower courts charged with the task of reviewing the size of punitive damages awards under the Due Process Clause need guidance from this Court. The Court's *BMW* decision may well provide that guidance. Because the same factors raised in *BMW* should inform any evaluation of the excessiveness of the punitive awards at issue here, the Court should either grant the petition at this time, or hold the petition pending disposition of *BMW* and then grant certiorari to allow the Illinois courts to fulfill their constitutional responsibilities in accordance with this Court's teachings in *BMW*.

II.
THE ILLINOIS COURTS' APPLICATION OF RULE 237(b) VIOLATES THE DUE PROCESS CLAUSE.

The above discussion shows why the punitive damages judgments here must be reviewed for excessiveness in light of the impending *BMW* decision. But there is yet another reason to grant Owens-Corning's certiorari petition: the judgments in the four actions were based on drastic defaults entered through an unconstitutional application of Illinois Supreme Court Rule 237(b). The trial court sanctioned Owens-Corning for not producing at trial — essentially to testify on plaintiffs' behalf — four specified out-of-state employees whose attendance the Illinois court itself could not constitutionally compel. Those orders — even though ostensibly directed at Owens-Corning rather than the named employees — amounted to unconstitutional state action in violation of the Due Process Clause.

Despite the trial court's lack of authority to compel the employees' appearance, the Appellate Court saw no due process

problem in sanctioning Owens-Corning for failing to force the four individuals to appear because "it is only the corporate defendant . . . which the court is attempting to compel." [16a.] The Appellate Court thus concluded that Owens-Corning, rather than the trial court, would be forcing the employees to submit to Illinois' jurisdiction. This reasoning, however, ignores the principle that the State may not do through a private person what the Fourteenth Amendment prohibits it from doing directly.

A. A State Court May Not Coerce a Private Party to Do What the Court Itself Cannot Do.

This Court's precedents establish that a State may not avoid constitutional limitations on its own powers simply by having a private party act on its behalf or in its stead. If the Fourteenth Amendment precludes the State itself from doing something, the State "may not [so act] by direct action or through the medium of others who are under State compulsion to do so." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 171 (1970) (emphasis and quotations omitted); *see, e.g., Barrows v. Jackson*, 346 U.S. 249, 253-54 (1953) (State cannot discriminate and therefore cannot coerce private parties to honor racially restrictive covenants by awarding damages for breach, even though private parties could make and adhere to such covenants); *Truax v. Raich*, 239 U.S. 33, 38-39, 41 (1915) (State cannot deny employment to noncitizens and therefore cannot do so indirectly by setting limit on number of noncitizen employees whom private employers may hire, even though private employers could fire or refuse to hire employees at will).[9]

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9. *See also Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (Fourteenth Amendment violated where blacks were denied service and arrested in private restaurant because of ordinance requiring (continued...)

It is undisputed here that the trial court itself lacked jurisdiction to order the four out-of-state employees to travel from Ohio to testify at trial. [16a, 35a-36a.][10] Accordingly, the court could not accomplish this result indirectly by forcing Owens-Corning to compel the employees' appearance.

It is no answer to say that Owens-Corning could have ordered its employees or directors to travel to Illinois to testify, or that Owens-Corning "chose" to suffer a default rather than to command the named individuals to appear. Where the State subjects Owens-Corning to default judgments of almost $11 million for failing to make a "choice" that plaintiffs and the trial court wanted it to make (but could not have compelled through subpoena power), that "choice" is just as coerced and illusory as was the private

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9.(...continued)

racial separation; even though "manager would have acted as he did independently of the existence of the ordinance," convictions "had the effect . . . of enforcing the ordinance"); *cf. Lebron v. National R.R. Passenger Corp.*, 63 U.S.L.W. 4109, 4116 (U.S. Feb. 21, 1995) ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form.").

10. A court cannot require individuals to give evidence unless it can exercise personal jurisdiction over them. *E.g., Robertson v. Railroad Labor Board*, 268 U.S. 619, 622-27 (1925); *In re Sealed Case*, 832 F.2d 1268, 1272-73 (D.C. Cir. 1987). The Due Process Clause itself precludes a sovereign from exercising personal jurisdiction over a person or entity who does not have at least "minimum contacts" with the forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). It is immaterial that the Illinois court had personal jurisdiction over Owens-Corning. Employees' contacts with the forum "are *not* to be judged according to their employer's activities there." *Calder v. Jones*, 465 U.S. 783, 790 (1984) (emphasis added); *accord Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984).

employer's "choice" in *Truax* or the private covenantor's "choice" in *Barrows*. The decision "becomes not [Owens-Corning's] voluntary choice but the State's choice" that Owens-Corning compel the individuals' attendance "or suffer damages." *Barrows*, 346 U.S. at 254. State action therefore is present, and the Fourteenth Amendment constrains the court's conduct.

B. This Court's Review Is Necessary to Resolve this Important Constitutional Issue and to Prevent Rampant Litigation Abuse Threatening Recurrent Deprivations of Constitutional Rights.

The Illinois Appellate Court's constitutionally infirm ruling that an employer's judicially mandated coercion of its employees is not state action for due process purposes has potentially far-reaching implications. For example, the same reasoning would permit a State to sanction a private employer for refusing to require specified out-of-state employees, under threat of termination, to submit to state-court jurisdiction not only as witnesses but also as defendants — thereby circumventing the Fourteenth Amendment's prohibition against state-court exercise of jurisdiction over individual employees who themselves lack minimum contacts with the State, *see Calder*, 465 U.S. at 790; *Keeton*, 465 U.S. at 781 n.13. A State also could coerce an employer to order individual employees (in their personal capacity) to waive their Fifth Amendment rights against self-incrimination, or to do any number of other things the State itself could not require.

The constitutionality of state court rules requiring employers to produce their employees as witnesses is an important ques-

tion that recurs at the trial court level.[11] A state provision like Rule 237(b) can be a powerful weapon of harassment against corporate litigants such as Owens-Corning, which at the time of trial was a defendant in thousands of cases in Illinois alone — and nearly 100,000 asbestos personal injury cases nationwide. If any and every plaintiff, simply by filing a notice under a state rule, could require a corporate party anywhere in the world to drag its top officers, directors and employees into any state court in the nation, no company would be able to function. Its officers, directors and employees virtually would become full-time witnesses, spending their time in airplanes, lawyers' offices and courtrooms, rather than at their jobs.

In addition to encouraging recurrent harassment, the unconstitutional application of state rules such as Rule 237(b) creates a situation where a corporation's litigation adversaries (rather than the corporation itself) can determine which specific corporate employees must appear at trial to testify about matters known to the corporation. Such a regime is both grossly unfair and directly contrary to the ordinary rules of civil litigation, which grant adverse parties broad discovery of corporate employees through depositions at locations convenient to the employees — but which allow the corporation itself to choose its own corporate representatives for trial, at least where (as here) the individual witnesses lie outside the trial court's subpoena power.

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11. *See, e.g., Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill. App. 3d 425, 599 N.E.2d 129, 174 Ill. Dec. 583, *rev. denied*, 147 Ill. 2d 627, 606 N.E.2d 1227, 180 Ill. Dec. 150 (1992), *cert. denied*, 113 S. Ct. 2335 (1993); *see also Kearney v. Brakegate, Ltd.*, 263 Ill. App. 3d 355, 636 N.E.2d 117 (1994); *Adcock v. Brakegate, Ltd.*, 247 Ill. App. 3d 824, 617 N.E.2d 885 (1993), *aff'd on other grounds*, No. 76053, 1994 Ill. Lexis 156 (Ill. Nov. 23, 1994).

Owens-Corning believes that the issues posed by state provisions like Rule 237(b) regularly arise in actions against corporate defendants in Illinois and other states with similar rules, *see, e.g.*, Wash. Court Rule 43(f)(1); N.H. Rev. Stat. Ann. §§ 516:9-10, but tend to evade review. Both the magnitude of the possible sanctions for refusing to compel out-of-state employees to appear and the unavailability of an appeal as of right until after entry of final judgment can strongly discourage a party defending a single action from taking the position that Owens-Corning took below. *See Bluestein v. Upjohn Co.*, 102 Ill. App. 3d 672, 678-79, 430 N.E.2d 580, 585 (1981) (after Illinois Supreme Court denied mandamus petition, defendant produced witness). A "repeat" litigant such as Owens-Corning, however, which has been sued in hundreds of thousands of cases, cannot afford to acquiesce every time a plaintiff demands that it bring specified officers, employees or directors to a foreign State. This Court therefore should review the judgment below to provide guidance to litigants and trial courts about the constitutional validity of Rule 237(b) and similar provisions in other States.

CONCLUSION

The Court therefore should grant Owens-Corning's petition for a writ of certiorari.

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March 6, 1995